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OFFICE OF PETITIONS

In re Patent No. 6,040,910	:	
Issue Date: April 18, 2000	:	
Application No. 09/294,528	:	DECISION ON PETITION
Filed: April 19, 1999	:	
Title: Athletic Training Glove	:	
	:	

This is a decision on the renewed petition under 37 C.F.R. §1.378(b), filed June 19, 2006.

The petition under 37 C.F.R. § 1.378(b) is **GRANTED**.

Background

The above-identified patent issued on April 18, 2000. Accordingly, the first maintenance fee could have been timely paid during the period from April 18, 2003 through October 18, 2003, or with a late payment surcharge during the period from October 19, 2003 through April 18, 2004. No maintenance fee having been received, the patent expired on April 19, 2004. Patentee filed a petition to reinstate the expired patent on April 20, 2005. However, the petition was dismissed in a decision mailed on August 3, 2005. Patentee filed a renewed petition on September 29, 2005. In response, the Office mailed a Request for Information on April 20, 2006, to which patentee has timely responded.

With the prior filed petitions, petitioner stated that he was unable to timely pay the maintenance fee due to the restrictions of his Chapter 13 bankruptcy proceeding. Petitioner stated that he became free to make payments outside of his Chapter 13 status on November 9, 2005. Petitioner included copies of his bankruptcy papers (Form B10), with a filing date of May 28, 2003,

showing that he owed \$30,516 in taxes to the IRS. Also included was a "Notice of Section 341(a) Meeting and Hearing on Confirmation of Chapter 13 Plan with Copy of Chapter 13 Plan", dated April 28, 2003, a "Motion Under Local Bankruptcy Rules 3015-1(n) and 9013-1(g) to Modify Plan or Suspend Plan Payments; Trustees Comments, Order Thereon", filed March 9, 2004, adding \$2000 in attorney's fees to the bankruptcy plan. Lastly, petitioner included a "Withdrawal of Trustee's Motion to Dismiss Chapter 13 Case", dated March 25, 2005.

Relevant Statutes and Regulations

35 U.S.C. § 41(c)(1) states that:

The Commissioner may accept the delayed payment of any maintenance fee required ... after the six month grace period if the delay is shown to the satisfaction of the Commissioner to have been unavoidable.

37 C.F.R. § 1.378(b) provides that:

Any petition to accept an unavoidably delayed payment of a maintenance fee must include:

- (1) The required maintenance fee set forth in §1.20(e) through (g);
- (2) The surcharge set forth in §1.20(i)(1); and
- (3) A showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent. The showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly.

§ 1.378(b)(3) is at issue in this case. Acceptance of a late maintenance fee under the unavoidable delay standard is considered under the same standard for reviving an abandoned application under 35 U.S.C. § 133. This is a very stringent standard. Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. In addition, decisions are made on a "case-by-case basis, taking all the facts and circumstances into account."

Smith, 671 F.2d at 538, 213 U.S.P.Q. at 982. Nonetheless, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines, 673 F. Supp. at 316-17, 5 U.S.P.Q.2d at 1131-32 (N.D. Ind. 1987).

Moreover, delay resulting from the lack of knowledge or improper application of the patent statutes, rules of practice or the Manual of Patent Examining Procedure, however, does not constitute "unavoidable" delay.

35 U.S.C. § 41(c)(1) does not require an affirmative finding that the delay was avoidable, but only an explanation as to why the petitioner has failed to carry his or her burden to establish that the delay was unavoidable. Cf. Commissariat A. L'Energie Atomique v. Watson, 274 F.2d 594, 597, 124 USPQ 126, 128 (D.C. Cir. 1960) (35 U.S.C. § 133 does not require the Commissioner to affirmatively find that the delay was avoidable, but only to explain why the applicant's petition was unavailing). Petitioner is reminded that it is the patentee's burden under the statutes and regulations to make a showing to the satisfaction of the Commissioner that the delay in payment of a maintenance fee is unavoidable. See Rydeen v. Quigg, 748 F. Supp. 900, 16 USPQ2d 1876 (D.D.C. 1990), aff'd 937 F.2d 623 (Fed. Cir. 1991), cert. denied, 502 U.S. 1075 (1992); Ray v. Lehman, 55 F. 3d 606, 608 - 609, 34 USPQ2d 1786, 1787 (Fed. Cir. 1995).

Analysis and Conclusion:

On renewed petition, patentee has supplied the requested information in response to the letter mailed April 20, 2006. Accordingly, it is concluded that based on the facts and circumstances of this case, patentee has established that the entire period of delay was unavoidable due to financial hardship.

The maintenance fee in this case is accepted and the above identified patent is hereby reinstated as of the mail date of this decision.

Second Maintenance Fee:

Patentee is reminded that the one year window for paying the second maintenance fee (currently \$1,150 for a small entity) opened on April 18, 2007. The maintenance fee can be paid without the late payment surcharge of \$65 up until October 18, 2007. From October 19, 2007 to April 18, 2008, petitioner will need to pay the maintenance fee as well as the surcharge. If the maintenance fee (and surcharge, if applicable) is not received by April 18, 2008, the patent will expire on April 18, 2008. Patentee should verify that the fees have not increased prior to submitting payment.

The file is being forwarded to Files Repository.

Telephone inquiries concerning this communication should be directed to the undersigned at 571-272-3207.

Cliff Congo

Cliff Congo
Petitions Attorney
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